Supreme Court, U.S.
FILED

Case No. _____

UNITED STATES SUPREME COURT

1993 Term

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT

PETITIONER

V.

UNITED STATES OF AMERICA, ET AL

RESPONDENT

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LAURENCE J. ZIELKE
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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE UNITED STATES' ENTRY INTO A CONSENT DECREE WHICH STAYS ENFORCEMENT OF FEDERAL LAW BAR THE UNITED STATES FROM FURTHER ENFORCEMENT PROCEEDINGS UNDER THE SAME LAW UNTIL THE PURPOSES OF THE CONSENT DECREE HAVE BEEN MET.

PARTIES

Petitioner:

Louisville and Jefferson County
Metropolitan Sewer District
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Louisville, KY 40202

Respondents:

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I. REPORTS AND OPINIONS OF OTHER COURTS AND ADMINISTRATIVE AGENCIES

1. Order entered by Chief Judge Thomas A. Ballantine, Jr., of the United States District Court for the Western District of Kentucky at Louisville in the matter of the United States of America and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District, Civil Action No. C 78-0130-L(B), entered July 3, 1991.

2. Memorandum entered by Chief Judge, Thomas A. Ballantine, Jr., of the United States District Court for the Western District of Kentucky at Louisville in the matter of the United States of America and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District, Civil Action No. C 78-

0130-L(B), entered November 8, 1991.

3. Order entered by Chief Judge, Thomas A. Ballantine, Jr., of the United States District Court for the Western District of Kentucky at Louisville in the matter of the United States of America and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District, Civil Action No. C 78-0130-L(B), entered November 8, 1991.

4. Mandate entered by the United States Court of Appeals for the Sixth Circuit on appeal from the United States District Court for the Western District of Kentucky in the matter of the United States of America and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District and Commonwealth of Kentucky, Civil

Action No. 91-6461, entered January 12, 1993.

Entered as Mandate March 23, 1993.

4. Order denying Petition for Rehearing and Rehearing En Banc entered by the United States Court of Appeals for the Sixth Circuit in the matter of the United States of America and City of Louisville v. Louisville and Jefferson County Metropolitan Sewer District and Commonwealth of Kentucky, Civil Action No. 91-6461, entered March 12, 1993.

II. JURISDICTION

A final and appealable decree was entered by the United States Court of Appeals for the Sixth Circuit on January 12, 1993. An Order denying the Petition for Rehearing and Rehearing En Banc was entered on March 12, 1993. The decree was issued as a Mandate on March 23, 1993.

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. APPLICABLE CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS.

33 U.S.C. §1251, et seq.

33 U.S.C. §1319.

IV. STATEMENT OF CASE

This case involves a Consent Decree entered in 1981 which suspended enforcement of the Clean Water Act, 33 U.S.C. §1251 et seq; and 33 U.S.C. §1319 against the Louisville and Jefferson County Metropolitan Sewer District until construction defects in the Morris Forman Wastewater Treatment Plant were corrected. Under the Consent Decree, the Environmental Protection Agency was required to timely review, approve, and then fund all remedial work necessary to correct the defects so that the Morris Forman Wastewater Treatment Plant could treat effluent within its permit limits at the plant's design capacity of 105 million gallons per day (105 mgd). The Environmental Protection Agency ("EPA") arbitrarily delayed approval of the last corrective action needed for over four

(4) years and then moved the District Court to terminate the Consent Decree. The EPA knew that the purpose of the Consent Decree was to rectify the defects in the Treatment Plant to allow it to treat effluent at its design capacity of 105 mgd. The EPA knew that the last remedial work, approved by the EPA, was not yet completed and would not be completed until 1995 due to the delay in approval by the EPA. The EPA knew that, until that remedial work was completed, the Treatment Plant could not meet effluent standards, thereby subjecting MSD to enforcement actions for unpreventable violations. The District Court terminated the Consent Decree at the request of the United States Environmental Protection Agency, over the protest of MSD.

The Louisville and Jefferson County

Metropolitan Sewer District ("MSD") is a political subdivision of the Commonwealth of Kentucky, responsible for providing sanitary sewer collection and treatment for Jefferson County, Kentucky. In the 1970's, MSD, with EPA approval and funding, contracted for the design and construction of the 105 mgd Morris Forman Waste Water Treatment Plant ("Treatment Plant"). Unfortunately due to defective design and construction, the Treatment Plant was not able to treat effluent within the limits set by the permit issued by the EPA, even at a volume substantially less than 105 mgd.

On or about April 7, 1978, EPA filed a Complaint in the United States District Court for the Western District of Kentucky against MSD and the Commonwealth of Kentucky under 33 U.S.C. § 1319 of the Clean Water Act, 33 U.S.C. §1251 et seq.

The City of Louisville, Kentucky, intervened in the action.

Extensive negotiations ensued to resolve the litigation and to diagnose the cause of the failure of the Treatment Plant to meet permit limitations. In an effort to determine the measures that MSD should take to correct the problems, the EPA created a review team. The review team's inspection and analysis of the Treatment Plant resulted in a EPA report dated October 31, 1980 which set forth The recommendations of the review team. These recommendations formed the basis for the Memorandum of Understanding between the parties which was subsequently incorporated into the Consent Decree. Under the Consent Decree, MSD was to undertake two steps to bring the Treatment Plant into compliance with its permit. First MSD was to

conduct an "Interim Corrective Action Program" to make limited corrective improvements to the Treatment Plant. Secondly MSD was to perform an evaluation to determine whether or not additional remedial work was required to fully rectify the defects in the Treatment Plant. If the Treatment Plant could not achieve compliance with applicable effluent limitations without additional improvements, MSD was to submit a "Final Plan and Schedule" detailing the additional remedial work required to achieve compliance with the applicable effluent limitations at design capacity. The EPA agreed to timely review and approve all necessary remedial work submitted under the Final Plan and Schedule to correct the defects. The EPA also agreed to suspend enforcement of the Clean Water Act until all remedial

actions were taken. Once the Final Plan and Schedule was approved by the EPA, MSD was required to carry out the Final Plan and Schedule to bring the Treatment Plant into compliance.

MSD proceeded to undertake the actions required by the Consent Decree and completed the Interim Corrective Action Program and the Evaluation Program as scheduled. MSD submitted its Final Plan and Schedule to the EPA in 1984. MSD's evaluation revealed that an additional UNOX reactor, also referred to as Battery D, was needed to achieve compliance at design capacity. The EPA arbitrarily and without basis disagreed with the necessity of this item. Furthermore, it unnecessarily delayed approving the Final Plan and Schedule for over four years, thereby delaying MSD's ability to correct the defects. Finally

in 1988, the EPA approved the Final Plan and Schedule including the additional UNOX reactor. (It should be noted that the majority opinion of the 2-1 panel erroneously states that approval came after the EPA sought to terminate the Consent Decree).

Shortly after approving the Final Plan and Schedule, the EPA contacted MSD, seeking to terminate the Consent Decree by agreement. This contact was made despite the fact that the remedial work contained in the Final Plan and Schedule had not yet been approved, funded, and constructed as required by the Consent Decree. Furthermore, EPA's delay in approving the remedial work, which was in breach of its duties under the Consent Decree, also delayed the completion of the remedial work.

The EPA unilaterally decided to

change the purpose of the Consent Decree to only achieve compliance with effluent limitations at a level less than the plant's design capacity of 105 mgd. This was because the Treatment Plant had met effluent limitations at a volume less than 105 mgd for a period of three (3) years. The lower volume was due to two (2) factors: (1) an unfortunate explosion which destroyed a substantial portion of the system, and (2) a reduction in industrial waste. Those factors coupled with the limited corrective actions taken under the Consent Decree resulted in compliance. Compliance was never achieved at normal levels, nor at design capacity.

The EPA moved for termination of the Consent Decree based on false assertions that temporary compliance fulfilled the purposes of the Consent Decree. MSD

opposed that Motion for the reason that all remedial work was not yet completed.

It was only in 1989, the EPA finally authorized a grant to MSD through the Commonwealth of Kentucky for the construction of UNOX towers as provided for by the Final Plan and Schedule. Later, MSD proposed to construct Bioroughing Towers in lieu of the additional capacity to the UNOX reactors that would be provided by Battery D. That construction was subsequently approved, has been funded, and is now under construction, with completions scheduled for 1995.

The Bioroughing Towers are the final phase of the work to be done under the Final Plan and Schedule of the Consent Decree. Once the Bioroughing Towers are completed, MSD should be able to treat 105 mgd within the effluent limitations

imposed by the EPA-issued discharge permit. Had the EPA not wrongfully delayed approving the Final Plan and Schedule, the work would have been completed by now.

Furthermore, during the construction phase of the Bioroughing Towers, the effluent limits will be increasingly exceeded, as all of the parties were aware. Despite that knowledge, the EPA moved for termination of the Consent Decree.

On July 3, 1991, the District Court entered an Order terminating the Consent Decree. MSD and the City of Louisville moved for reconsideration. On November 8, 1991, the District Court issued a Memorandum and a final appealable Order denying the Motion for Reconsideration filed by MSD and the City of Louisville. Notice of Appeal was timely filed and an

appeal taken to the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1291.

On January 12, 1993, the Sixth Circuit, in a 2-1 opinion, affirmed the District Court's Order. On March 12, 1993, an order was entered denying MSD's Petition for Rehearing and Suggestion for Rehearing En Banc. On March 23, 1993, the opinion was issued as a mandate.

V. BASIS FOR ALLOWANCE OF THE WRIT

The District Court erred in terminating the Consent Decree before compliance with the Clean Water Act was achieved.

The issues in this Petition focus on the interpretation to be given the Consent Decree entered by the District Court on November 24, 1981. The question is whether or not all the conditions of the Consent Decree were fulfilled,

thereby justifying its termination.

The Court has stated that because the terms of Consent Decree arrived through the mutual consent of the parties, they closely resemble contracts and may provide for broad relief or terms than could have been awarded at trial. Local No. 93 v. City of Cleveland, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).

When construing a Consent Decree, you may rely upon certain aids to construction, including the circumstances surrounding the formation of the Decree and any documents incorporated into the Decree, without violation of the "four corners" rule of United States v. Armour & Co, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). ITT Continental Baking Co., 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975).

Furthermore a Decree must be strictly construed to preserve the bargained for position of the parties, Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983). Consideration must be given to the original expectations of the parties. Keith v. Volpe, 784 F.2d 1457 (9th Cir. 1986). Any vague or confusing language should be interpreted in a way that implements the purposes of the Decree. Pasadena City Board of Education v. Spangler, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976).

The Consent Decree entered in this action, does not specifically describe all the corrective work to be done to accomplish the purpose of the Consent Decree, thereby allowing the Consent Decree to be terminated. The Consent Decree set forth certain specific corrective actions to be taken and

required an evaluation to determine what additional remedial work would be needed to bring the Treatment Plant into compliance with the effluent limits of the EPA issued permit at the design capacity of 105 mgd. That additional corrective construction was, and is, the Bioroughing Towers.

The corrective construction was submitted by MSD with the Final Plan and Schedule which was approved by the EPA in 1988. Therefore, it is clear that the Consent Decree contemplated the construction of remedial construction such as the Bioroughing Towers. The Consent Decree further contemplated that it would remain in effect until that construction was completed. The EPA specifically agreed to suspend enforcement of the Clean Water Act until such time as all corrective actions were

taken. That element of the Consent Decree had a res judicata / estoppel effect on all enforcement actions while the decree was in effect. United States v. Rogers, 960 F2d 1501 (10th Cir. 1992). It allowed MSD to focus its energy on rectifying the defects in the Treatment Plant as quickly as possible, so that compliance with the Clean Water Act could be achieved. By terminating the Consent Decree before all the defects were corrected, the United States can ignore its agreement to not bring any enforcement action until the defects are corrected.[1]

This situation is analogous to a defective dam. Suppose a dam was being constructed to protect a town from a 100

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[1]Documents germane to this are under seal with the Sixth Circuit.

year flood. Suppose further that there was a Dam Protection Agency ("DPA") which mandated that the Dam owner provide flood protection to the town. But it is determined that the dam that was constructed was defective and unable to even protect against a 10 year flood. Therefore a corrective action plan is required by the DPA to correct the problem. At some point, the dam is sufficiently high to protect against a 10 year flood, but not yet high enough to protect against the 100 year flood. The DPA decided that since there have been no floods over the past few years, the dam is in compliance and no further work is needed. But a 100 year flood has not yet struck. If it does there will be a flood.

Like the Dam Protective Agency, the EPA has stated that MSD had complied to

the Consent Decree because the Treatment Plant was able to stay within its effluent limits during the three (3) year period. But that compliance was due to the Treatment Plant not yet receiving effluent in the volume it was designed to receive: 105 mgd.

The Consent Decree was a contract between EPA and MSD. MSD bargained to rectify the defects of the Treatment Plant without threat of penalties while so doing; and get what it had contracted for: a treatment plant that would treat 105 mgd of effluent within MSD's permit limits. The EPA review team made recommendations to achieve that goal. The EPA agreed to suspend enforcement of the Clean Water Act until the repairs were completed. The EPA should not have been permitted to prematurely terminate the Consent Decree before all the

corrective work has been completed, simply because its own purposes may have been satisfied. As stated by Chief Judge Merritt in his well-reasoned dissent, "It maybe administratively more convenient for EPA to have the agreement terminated now. It may be unfair to some cities which have no comparable agreement to require them to pay penalties when they fail to meet effluent limitations. It may be that EPA made a bad deal when it signed this Consent Decree. But none of these are reasons which justify termination of the settlement agreement." Merritt Dissent, Appendix D at page 27.

Perhaps the benefits to MSD did go beyond that which would have been achieved at trial. But such relief is permitted. Local 93, supra, at 525.

VI. CONCLUSION

The District Court erred in

terminating the Consent Decree before the defects in the Treatment Plant were fully corrected by the construction of the Bioroughing Towers. The District Court and the Court of Appeals 2-1 majority opinion misinterpreted the portions of the Consent Decree which called for construction of additional corrective measures deemed necessary to bring the plant in compliance under the Final Plan and Schedule. That additional work was submitted with the Final Plan and Schedule, which was approved by the EPA, and now construction has begun on those measures. The Consent Decree should not have been terminated until those measures are completed. The EPA should not now be allowed to institute enforcement actions under the same federal law for the same problem which resulted in the Consent Decree, when the defects are not yet

rectified. This is especially true where the delay in achieving compliance is solely due to the inexcusable delay of the EPA in approving the Final Plan and Schedule. The Courts should not allow the EPA to terminate this Consent Decree for that purpose.

Wherefore, for the foregoing reasons, Louisville and Jefferson County Metropolitan Sewer District respectfully Petitions the United States Supreme Court for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA
Plaintiff

and

CITY OF LOUISVILLE
Intervenor Plaintiff

v. No. C 78-0130-L(B)

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT, et al.
Defendants

O R D E R

This matter has come before the Court on the Motion of the United States of America to terminate the Consent Decree entered in this action and the motion of the Louisville and Jefferson County Metropolitan Sewer District to amend the Consent Decree to terminate in the future. The Court has reviewed the parties' memoranda and is sufficiently advised and therefore,

IT IS ORDERED that the defendants have fully complied with all provisions of the Consent Decree and it is the judgment of the Court that the Consent Decree is terminated as of the date of this Order.

This 3rd day of July, 1991.

THOMAS A. BALLANTINE, JR.
Chief Judge, U. S. District Court

Copies to counsel

Entered July 3, 1991

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA
Plaintiff

and

CITY OF LOUISVILLE
Intervening Plaintiff

v. No. C 78-0130-L(B)

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT and
COMMONWEALTH OF KENTUCKY
Defendants

O R D E R

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motions of the defendant, Louisville and Jefferson County Metropolitan Sewer District and the intervening plaintiff, City of Louisville, for reconsideration of the Court's Order of July 3, 1991 be and it hereby is denied.

This a final order.

This 8th day of November, 1991.

_____

THOMAS A. BALLANTINE, JR.
Chief Judge, U. S. District Court

Copies to counsel

Entered Nov 9, 1991

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA
Plaintiff

and

CITY OF LOUISVILLE
Intervening Plaintiff

v. No. C 78-0130-L(B)

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT and
COMMONWEALTH OF KENTUCKY
Defendants

MEMORANDUM

This matter is before the Court on the motions of the defendant, Louisville and Jefferson County Metropolitan Sewer District (MSD), and the intervening plaintiff, City of Louisville (City), for reconsideration of the Court's Order of July 3, 1991 terminating a Consent Decree. The Consent Decree was entered as a final judgment on November 24, 1981.

The Environmental Protection Agency

(EPA) brought this action in April, 1978, seeking civil penalties against MSD for violations of effluent limits imposed by National Pollution Discharge Elimination System (NPDES) Permit No. KY 0022411 at the Morris Forman Wastewater Treatment Plant (MFWTP). Title 33 U.S.C. § 1342. The NPDES permit had been issued to MFWTP in 1977 pursuant to the provisions of the Federal Water Pollution Control Act (the Clean Water Act).[1] Title 33 U.S.C. Sections 1251 et seq. Prior to the execution of the Consent Decree, the EPA and MSD entered into a Memorandum of Understanding (MOU) in which the parties stated their intention to resolve the litigation and discussed the provisions subsequently embodied in the Consent

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[1]NPDES permits are valid for no more than five years.

Decree.

MSD stipulated that it had violated the permit. The Consent Decree provided that MSD would initiate an Interim Corrective Action Program (ICAP) and an Evaluation Program (EP) as the first steps of a "phased approach" to bring MFWTP into compliance with "applicable effluent limitations." Pursuant to those programs MSD was to implement limited improvements to the MFWTP and evaluate the operation of the facility, using certain tests outlined in Appendix A to the Consent Decree. MSD was to submit to EPA written notification of each corrective action indicated as necessary during the evaluation period and state whether the action constituted a major modification, a minor modification or an operational improvement. MSD was also to submit a "final design report identifying

the performance improvements of minor modifications and operational improvements, and the cost effectiveness of major physical modifications that may improve the performance of the final settling tanks," along with a summary report of the test results. Similarly, MSD was to initiate and complete a performance test of the oxygen dissolution capacity of the UNOX reactors and equipment and submit a summary report along with recommendations for "any required structural/equipment modifications." After completion of the ICAP and the EP, MSD was to complete a cost effectiveness analysis of any major modifications and then submit a Final Plan and Schedule (FP&S) "for achieving compliance with all applicable effluent limitations" to the EPA for its approval. According to the terms of the Consent

Decree, MSD was to carry out the FP&S only after its approval by EPA.

Section V of the Consent Decree providing for MSD's interim compliance states in pertinent part:

> (B) The parties recognize that MSD's current NPDES permit is scheduled to expire on June 30, 1982. It is the intent of the parties that in the NPDES permit renewal process for the [MFWTP] the terms of this Consent Decree shall be taken into account and that, to the extent permitted by law, the [EPA] shall propose a renewed permit, the terms of which are not inconsistent with those of this Decree.[2]

Section VII provides:

> The parties have agreed that certain elements of the current Corrective Action Program at eligible for federal funding under the provisions of the Federal Water Pollution Control Act, as amended; that they disagree as to the eligibility of other elements of the program and

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[2] MFWTP's permit was renewed and the renewed permit expired in 1987. As of 1990, MSD was still operating under the expired permit.

that these elements will be the subject of an appeal as provided for under Subpart J, Part 30 of Title 40 of the Code of Federal Regulations; and that other elements of the program will be eligible for federal funding if they are found to be necessary under the Interim Corrective Action and Evaluation Program ....[3]

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[3] The MOU separated into four categories the items in MSD's Revised Corrective Action Program for which funding was sought. The UNOX reactor was included in Category C:

"Those items which EPA believes to be grant eligible, but for which EPA questions the necessity pending the evaluations noted above in Section III. The parties agree that should the evaluations indicate that these items are necessary to meet applicable effluent limitations, EPA will fund them promptly, contingent

Finally, the Consent Decree provides that the Court will retain jurisdiction "for such further orders as may be necessary or appropriate for the construction or implementation of this Decree or for the enforcement or compliance therewith" and that the Decree "shall terminate upon application of the parties."

On June 10, 1983, MSD submitted the FP&S to EPA for approval and funding. The FP&S provided for the addition of a UNOX Battery ("Battery D" or "UNOX") to the MFWTP. In March, 1985, EPA informed MSD that it "was not convinced" of the necessity for Battery D and that its eligibility would not be considered "unless its need is demonstrated after

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upon the availability of federal funds."

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other phases are completed." In response, MSD retained Camp, Dresser & McKee, Inc. (CDM), specialists in sewer plant design, construction and operation to evaluate the need for Battery D. In June, 1985, CDM's report, supporting MSD's position, was submitted to EPA. In August, 1985, EPA notified MSD that it had "considerable doubt" as to the necessity of Battery D and that it believed compliance with effluent limits could be met with the items already funded. However, EPA added that it might reconsider its decision if the funded items did not bring MFWTP in compliance. In November, 1988, while the renewed NPDES permit was still in effect for MFWTP, MSD received a letter from the EPA stating:

> [T]he Final Plan and Schedule (FPS) developed under Grant No. C210553-03 was conditionally accepted by EPA,

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> but never officially approved .... Since EPA's initial receipt and review of the FPS, the proposed option to increase the capacity of unit processes in the plant has been implemented in accordance with EPA comments. The implemented plan is providing wastewater treatment in accordance with the limits of the NPDES permit. Therefore, this letter constitutes EPA approval of the Final Plan and Schedule.

Only July 20, 1989, Russell Wright, an EPA representative, contacted William Gatewood, Manager of the Construction Grants Branch of the Division of Water for the Kentucky Department of Natural Resources and Environmental Protection Cabinet (KNREPC). Wright informed Gatewood of a June 29th meeting with MSD in which the EPA and the Kentucky Division of Water agreed to MSD's request for a "reevaluation of <u>their proposed project</u> of adding another unox oxygenation battery, known as Battery D, to their existing plant."

(Emphasis added).[4]

On November 6, 1989, MSD contacted KNREPC to set up a time to discuss issues related to "remaining aspects of the Final Plan and Schedule Construction Projects," including Battery D. In the letter, MSD stated that all necessary improvements to the MFWTP had been implemented or were currently under construction except for Battery D. MSD

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[4] During this time, EPA was delegating responsibility for wastewater regulations to the State and a new discharge permit had been proposed for MFWTP by KNREPC. The proposed permit contained stricter effluent limitations. MSD asserted to KNREPC that it would not be able to meet the more stringent standards in the proposed permit without the addition of Battery D.

also noted that MSD's service area was expanding, "additional sludge flows were not included or anticipated in the development of the FP&S" and that the proposed NPDES permit "includes additional effluent criteria" not provided for or anticipated in the FP&S.

On July 17, 1990, the United States, on behalf of the EPA and joined by the Commonwealth of Kentucky, filed a motion to terminate the Consent Decree on the basis of MSD's compliance with its NPDES permit from 1986 through 1990. On August 17, 1990, MSD submitted to KNREPC for approval a design for bioroughing towers to be constructed at MFWTP in lieu of Battery D and on October 1, 1990, EPA notified MSD that a federal grant for the bioroughing towers had been approved. On July 3, 1991, this Court terminated the Consent Decree, finding that the

underlying purpose of the Decree had been satisfied.

The parties agree that a Consent Decree must remain in effect so long as its continued enforcement is necessary to effectuate its purposes. The purpose of the Consent Decree in the case at hand was to bring MFWTP into compliance with the law.[5] The parties' argument over

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[5] "The authority of a federal district court to adopt a consent decree comes only from the statute which the decree is intended to enforce. If there is a 'purpose' to be effectuated, it is the purpose of the statute pursuant to which the government seeks relief. Within that framework the parties strike their bargain." United States v. Motor Vehicle Manufacturers Assoc. of the United States, 643. F.2d 644, 650 (9th

when the Consent Decree may properly terminate stems from conflicting interpretations of critical terms of the Decree. MSD argues that all the work identified in the FP&S has not been completed and therefore, the Consent Decree may not be terminated. The United States argue that MFWTP's compliance with effluent limitations at any stage of major modifications, set forth in the FP&S and approved by EPA, required termination of the Consent Decree.

Consent decrees have been recognized as having attributes of both contracts and judicial acts. United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n. 10, 95 S.Ct. 926, 934 n. 10, 43 L.Ed.2d 148 (1975); United States v. Armour & Co., 402 U.S. 673, 681-82, 91

Cir. 1981).

S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). Principles of contract law are used for purposes of interpreting the meaning of a consent decree. Only when the language of a consent decree is not clear on its face, have courts been forced to resort to equitable considerations to define the limits of a consent decree. Chrysler Corp. v. United States, 316 U.S. 556, 62 S.Ct 1146, 86 L.Ed. 1668 (1942).

We find that the language of the decree is quite clear and that its purposes have been accomplished.

Appendix A of the Consent Decree provides for MSD to undertake a series of interim steps to determine whether limited improvements would bring about compliance with "applicable effluent limitations." A cost effectiveness analysis of suggested major plant modifications was to be implemented in

the event that the interim steps did not result in compliance and only then was the FP&S to be developed by MSD. Nothing in the language of the Consent Decree or the Memorandum of Understanding compels the conclusion that the EPA was required to approve the entire FP&S as initially submitted by MSD. It appears from the face of the Consent Decree that MSD's requirement to implement any of the FP&S was contingent on EPA's approval of any part of the FP&S. The record shows that MSD formally approved the FP&S and found MSD to be in compliance with "applicable effluent limitations" in November of 1988. MSD does not deny that it was in compliance with the renewed NPDES permit in November of 1988 and it had been in compliance until 1990. Therefore, the duties of EPA and MSD under the terms of the Consent Decree ended as of November,

1988. The July 20th, 1989, letter to KNREPC from the EPA does not suggest that the EPA changed its position as to the requirements of the Consent Decree.

In addition, Section V of the Consent Decree contemplates that the "applicable effluent limitations" referred to throughout the Consent Decree are those limitations imposed by the NPDES permit issued in 1977 and the renewed permit which expired in 1987.[6] MSD requested approval of Battery D from the KNREPC based on a projected increase in effluent flow and the heightened requirements of a proposed NPDES permit.

The City and MSD argue that the Consent Decree may only be terminated on the agreement of all parties and

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[6] See footnote 2.

therefore, the Court did not have jurisdiction to terminate the Consent Decree.

Section XII provides: "This Decree shall terminate upon application of the parties." This provision simply allows the parties to terminate the Decree by agreement; it does not divest the Court of jurisdiction to end the Decree upon the motion of any party and a finding that the purposes of the Decree have been fulfilled.

An appropriate order has been entered this 8th day of November, 1991.

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THOMAS A. BALLANTINE, JR.
Chief Judge, U.S. District Court

Copies to counsel

Entered Nov 8, 1991

APPENDIX D

NO. 91-6461
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JAN 12 1993

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

CITY OF LOUISVILLE,

Intervening Plaintiff-Appellee,

v.

On Appeal from the United States District Court for the Western District of Kentucky

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT

Defendant-Appellant,

COMMONWEALTH OF KENTUCKY,

Defendant-Appellee

_____/

Before: MERRITT, Chief Judge; and GUY and RYAN, Circuit Judges.

Ralph B. Guy, Jr., Circuit Judge. Defendant, Metropolitan Sewer District, appeals the district court's order

terminating a 1981 consent decree. On appeal, defendant argues that the purpose of the consent decree has not been achieved and therefore the court should not have terminated the decree. We agree with the district court that the purpose of the consent decree has been accomplished and therefore affirm.

I.

Louisville and Jefferson County Metropolitan Sewer District (MSD) was created pursuant to enactments of the Kentucky Legislature, Ky. Rev. Stat. § 76.010, to develop and operate a sanitary and storm sewer system in Jefferson County, Kentucky. In the late 1970s, defendant contracted with Blount Brothers to build the Morris-Foreman Waste Water Treatment Plant (MFWTP), which was completed in 1974. The design plans, approved by the Environmental Protection

Agency, anticipated sewage flow of 105 million gallons per day. MFWTP was issued a National Pollutant Discharge Elimination System (NPDES) permit by the EPA in 1977 pursuant to applicable provisions of the Clean Water Act. This permit required MSD to meet specific effluent limitations for biochemical oxygen demand (BOD) and total suspended solids (TSS). Unfortunately, substantial defects in design caused the plant's effluent to exceed its permit limits. Major litigation ensued between MSD and Blount Brothers, resulting in a multi-million dollar settlement. However, MSD was still faced with a plant that was not complying with its permit requirements.

In April 1978, the EPA brought an enforcement action against MSD for violating the plant's permit. MSD faced civil penalties of $10,000 per day for

violating its permit. 33 U.S.C. § 1319(d) (1986). Over the next two years, the parties came to an agreement, memorialized in a "Memorandum of Understanding," and entered into a consent decree. According to appendix A of the consent decree, MSD was to undertake two steps to bring the plant into compliance with its permit. MSD was to conduct an "Interim Corrective Action Program" to ascertain if limited improvements to the plant could bring about compliance with applicable effluent limitations and an "Evaluation Program" to determine the relative feasibility and economic efficiency of alternative improvements. If these steps showed that the MFWTP could not achieve compliance with applicable effluent limitations without major physical modifications, then MSD was to submit a "Final Plan and

Schedule" detailing the major physical modifications and equipment modification required. According to the consent decree, "[u]pon approval by EPA Region IV, MSD shall carry out that Final Plan and Schedule." (App.62). The agreement also established those items EPA would fund and would not fund, those items the parties disagreed on funding, and those items the EPA felt were eligible for funding but would not approve unless shown to be necessary. The consent decree provided:

> Although § 1319(d) of 33 U.S.C. provides that penalties may be sought for violation of applicable effluent limitations, EPA has elected not to seek such penalties in this instance in light of MSD's substantial efforts including both studies and physical work to correct the deficiencies which have prevented MFWTP from achieving applicable effluent limitations.

(App.54).

MSD proceeded to undertake the

actions required by the consent decree, completing the Interim Corrective Action Program and Evaluation Program. The Final Plan and Schedule was submitted to the EPA in 1984. One item MSD felt was needed was an additional UNOX reactor, also referred to as Battery D. The EPA disagreed with the necessity of this item. In 1985, the EPA approved the Final Plan and Schedule, except for the additional UNOX reactor.

While the various studies were being conducted, events were changing the volume and quality of the sewage coming into the plant. In 1981, a substantial portion of MSD's sewer system was destroyed by a series of explosions. Additionally, industrial sewage began to diminish in the area. Carl Neumayer, the director of operations and maintenance of MSD, stated in his affidavit:

> As a result of the decrease in industrial sewage discharged into MSD's system, coupled with the Interim Corrective Actions undertaken by MSD in compliance with the Consent Decree, the quality of MSD's discharge effluent began to consistently meet the BOD and TSS effluent limitations set forth in MSD's EPA-issued discharge permit.

(App.116). The parties agree that, from 1986 until 1989 and for several months in 1990, the plant was meeting the permit requirements. In July 1990, the EPA moved for a termination of the consent decree, "certif[ying] that the defendants have fully complied with the provisions of the Consent Decree." (App.64).

In the meantime, in 1989, MSD had requested the EPA to re-evaluate the need for the additional UNOX reactor that the EPA omitted from its approval of the Final Plan and Schedule. Under the Clean Water Act, the EPA can give grants to assist the construction of wastewater

treatment plants. 33 U.S.C. § 1281(g) (1986 & Supp. 1992). But, under the complex procedures for grants, the EPA must wait until the state has certified a project and has determined that the project has priority over other works within the state. 33 U.S.C. § 1284(a)(3) (1986). On July 20, 1989, the EPA, following the established procedures for grants under the Clean Water Act, authorized the Commonwealth of Kentucky to review MSD's request for a re-evaluation of the need for the additional UNOX reactor. On August 17, 1990, after the EPA filed its motion for termination of the consent decree, MSD submitted a proposal for bioroughing towers, in lieu of UNOX reactor, to the Commonwealth of Kentucky, arguing it was required because of additional sludge flows that were not included or anticipated in the

development of the Final Plan. As Carl Neumayer explained in his affidavit:

> MSD has been consistently expanding its sewer lines throughout Jefferson County in compliance with the mandate imposed by KRS 76.010 in order to accommodate area development, population expansion and public health needs. In addition, MSD has assumed responsibility for treating sewage previously treated by private package sewage treatment plants so as to eliminate discharge of inadequately treated sewage into Kentucky's waterways. In the last several years industrial discharges into MSD's sewer system have increased. As a result, despite MSD's application of its best efforts, the MFWTP during significant portions of 1989 and 1990 has failed to achieve the effluent limitations imposed by the EPA-issued discharged permit.

(App. 116-17). Kentucky certified the bioroughing towers on August 22, 1990, one month after the government sought to terminate the consent decree. On October 1, 1990, the EPA approved funding for the project. MSD projects the bioroughing towers' completion date to be sometime in

1995.

On July 3, 1991, the district court entered its order terminating the consent decree. After MSD moved the court to reconsider its order, the court entered its final order terminating the consent decree on November 8, 1991. MSD argued, as it does on appeal, that until the bioroughing towers are completed the Final Plan and Schedule has not been "carried out" because the UNOX reactor (substituted with the bioroughing towers) was in MSD's proposed Final Plan. In it's memorandum, the court explained:

> The parties agree that a Consent Decree must remain in effect so long as its continued enforcement is necessary to effectuate its purposes. The purpose of the Consent Decree in the case at hand was to bring MFWTP into compliance with the law.[5] The parties' argument over when the Consent Decree may properly terminate stems from conflicting interpretations of critical terms of the Decree. MSD argues that all the work identified

in the FP&S has not been completed and therefore, the Consent Decree may not be terminated. The United States argues that MFWTP's compliance with effluent limitations at any stage of major modifications, set forth in the FP&S and approved by EPA, require termination of the Consent Decree.

Consent decrees have been recognized as having attributes of both contracts and judicial acts. United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n. 10, 95 S.Ct. 926, 934 n. 10, 43 L.Ed.2d 148 (1975); United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). Principles of contract law are used for purposes of interpreting the meaning of a consent decree. Only when the language of a consent decree is not clear on its face, have courts been forced to resort to equitable considerations to define the limits of a consent decree. Chrysler Corp. v. United States, 316 U.S. 556, 62 S.Ct. 1146, 86 L.Ed. 1668 (1942).

We find that the language of the decree is quite clear and that its purposes have been accomplished.

Appendix A of the Consent Decree provides for MSD to undertake a series of interim steps to determine whether limited improvements would bring about compliance with "applicable effluent

limitations." A cost effectiveness analysis of suggested major plant modifications was to be implemented in the event that the interim steps did not result in compliance and only then was the FP&S to be developed by MSD. Nothing in the language of the Consent Decree or the Memorandum of Understanding compels the conclusion that the EPA was required to approve the entire FP&S as initially submitted by MSD. It appears from the face of the Consent Decree that MSD's requirement to implement any of the FP&S was contingent on EPA's approval of any part of the FP&S. The record shows that MSD formally approved the FP&S and found MSD to be in compliance with "applicable effluent limitations" in November of 1988. MSD does not deny that it was in compliance with the renewed NPDES permit in November of 1988 and it had been in compliance until 1990. Therefore, the duties of EPA and MSD under the terms of the Consent Decree ended as of November 1988. The July 20th, 1989, letter to KNREPC from the EPA does not suggest that the EPA changed its position as to the requirements of the Consent Decree.

In addition, Section V of the Consent Decree contemplates that the "applicable effluent limitations" referred to throughout the Consent Decree are those limitations imposed by the NPDES permit issued in 1977 and the renewed permit which expired

in 1987. MSD requested approval of Battery D from the KNREPC based on a projected increase in effluent flow and the heightened requirements of a proposed NPDES permit.

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[5] "The authority of a federal district court to adopt a consent decree comes only from the statue which the decree is intended to enforce. If there is a 'purpose' to the effectuated, it is the purpose of the statue pursuant to which the government seeks relief. Within that framework the parties strike their bargain." United States v. Motor Vehicle Manufacturers Assoc. of the United States, 643 F.2d 644, 650 (9th Cir. 1981).

(App. 176-178) footnote 6 omitted).

II.

On appeal, defendants dispute the government's assertion and the district court's conclusion that the purpose of the consent decree has been met. MSD argues that the purpose of the consent decree was to bring the MFWTP into compliance with its permit limits while

operating at its design capacity of 105 million gallons of sewage flow per day.

Defendant initially opposed the entering of the consent decree, taking "the position that the more appropriate means of resolving the issues would be an extension of its existing NPDES permit. . . or an administrative order." (App. 86). Thus, we confront the facial anomaly, recognized by the district court in its memorandum and order denying defendant's request for a stay, issued July 2, 1992, of a defendant arguing it has not completed all the requirements of the consent decree and therefore the decree should not be terminated. Normally, liability under the Clean Water Act is strict, regardless of how efficiently an individual operates a plant. See United States v. Texas Pipeline Co., 611 F.2d 345 (10th Cir.

1979). Through the consent decree, defendant was allowed to avoid penalties so long as it, in good faith, used its best efforts to run the plant as efficiently as possible and take the required steps in the consent decree. Although defendant did consistently meet its permit requirements for several years in a row, it seeks to maintain the protection from the potential $25,000 a day in civil penalties until installation and testing of the bioroughing towers is completed.[1]

Defendant argues that the only

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[1]When this action was first brought, the civil penalties were $10,000 per day. The Clean Water Act has since been amended to provide for civil penalties up to $25,000 per day. 33 U.S.C. §1319(d) (Supp. 1992).

reason the plant was able to meet its permit requirements for those years was due to decrease in sewage flow and a concurrent increase in the "quality" of incoming sewage. MSD asserts that the government's position taken to the extreme is ludicrous: the plant could have met the permit requirements from day one by reducing its intake. However, MSD fails to see the parallel in its argument; taken to its extreme, MSD's position is untenable. What if the bioroughing towers fail to bring the plant within its permit limits while operating at the design capacity? Under MSD's proposed analysis of the consent decree, the purpose of the decree would not be achieved, so it must remain in force until additional measures are

taken.[2] Presumably, in the interim, MSD could continue to take on more and more customers, thus making the effluent requirements harder to attain.

The parties agree that the consent decree should terminate when the purpose of the decree has been fulfilled. They differ significantly on what that purpose is. The "four corners" of a consent

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[2]"The whole purpose of the Consent Decree was to correct [the plant's] defects. It follows that until all the defects are corrected, the purpose of the Consent Decree has not been met." (Def's Brief at 16). To counteract the extremity of their position, defendant, in response to the government's motion to terminate the consent decree, moved for modification of the decree setting a date certain for its termination.

decree are examined to determine its scope. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984). We agree with the district court that the purpose of the consent decree was to bring the plant into compliance with the law; indeed, its violation of the law is what prompted the EPA to bring the initial enforcement action. There is no indication in the consent decree that compliance while processing 105 million gallons of sewage was required.

This conclusion is further bolstered by an examination of the Clean Water Act's purposes. A consent decree should be construed against the background of the statute under which the action was brought. Las Vegas v. Clark County, 755 F.2d 697, 702 (9th Cir. 1985); United States v. Motor Vehicle Mfrs. Ass'n of the United States, Inc., 643 F.2d 644,

650 (9th Cir. 1981). The Clean Water Act does not contemplate compliance with NPDES permits while operating at design capacity; it requires compliance with permits, period. If a plant must reduce its sewage intake to comply, then that step must be taken. Further, the NPDES permits have a duration of five years, 33 U.S.C. § 1342(b)(1)(B) (1986), and, as a general rule, subsequent permits are supposed to be no less stringent than the one before it. 33 U.S.C. § (1342)(o)(1) (Supp. 1992). Through continued enforcement of the consent decree, MSD is seeking to be held to the effluent limitations of a permit issued fifteen years ago.

MSD argues that, because the additional UNOX reactor was in MSD's original Final Plan and Schedule and that because the EPA eventually approved its

construction, MSD should be allowed to complete it without the risk of civil penalties. When the parties entered into the consent decree, the additional UNOX reactor was in the category of those items that were eligible for funding but would not be funded unless their necessity was shown. It was not until after the MFWTP has been meeting its permit limits for several years that an increase in sewage quantity caused the EPA, through the Commonwealth of Kentucky, to find the additional UNOX reactor (substituted by the bioroughing towers) necessary. The 1978 consent decree's purpose was not to correct the design problems of the MFWTP for future increase sewage flow, but to correct the problems so that the then current effluents met the permit limits. Indeed, the EPA seemed correct in its evaluation

of the need for the additional UNOX reactor. The modifications the EPA approved without the UNOX reactor helped the MFWTP to finally achieve its permit limits, and to do so for several years.

Additionally, this litigation is primarily between two institutions -- the Environmental Protection Agency and the Louisville and Jefferson County Metropolitan Sewer District.[3]

> [C]onsent decrees which regulate institutional conduct are fundamentally different from consent decrees between private parties. . . . [T]hey affect more than the rights of the immediate litigants. The decrees reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its

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[3]Also party to this litigation are the Commonwealth of Kentucky, defendant now aligned with the plaintiff, and the City of Louisville, intervening plaintiff.

institutions.

Heath v. De Courcy, 888 F.2d 1105, 1109 (6th Cir. 1989). Considering the public's interest in compliance with the Clean Water Act, we are not prepared to say that a plant that was able to comply with its required effluent limitations for several years should now be allowed to again violate its permit with impunity while constructing new equipment. For 11 years, MSD has been allowed to use its "best efforts" to fix the problems at the plant without the fear of stiff civil penalties, and for several years the plant was able to comply with its permit. As the district court recognized, the purpose of the consent decree was achieved.

AFFIRMED.

Filed 1/12/93

Issued as Mandate 3/23/93

MERRITT, Chief Judge, dissenting. The consent decree is a contract between the government and the sewer district. I disagree with the Court's holding that "the purpose of the consent decree was achieved" and that the decree should, therefore, be terminated. The "effluent limitations" were met for only a short period at very low levels of discharge. The sewer district is now building two oxygenation towers to correct the problem. This work will cause part of the plant to remain shut down until completion. These additions are the type of improvements contemplated in the decree. The decree was entered to give the sewer district a chance to make such improvements. While this new

construction is going on, the plant cannot meet effluent limitations. Although the agreement is more than a decade old, the plant cannot meet the standards in part because the EPA did not authorize construction of the new towers until 1990.

There is no suggestion in the record that the district has not done everything it can under the consent decree to comply with the effluent standards. The sewer district advised EPA years ago that the towers would be needed, but EPA disapproved until two years ago. With construction incomplete, why should the decree end now? Why now subject the district to another lawsuit and to $25,000 a day in penalties. If the district is breaching the decree, it should be required to comply, but there is no such claim. And

there is no claim that the plant has ever met effluent limitations at its design capacity or at its present levels of effluent discharge.

It may be administratively more convenient for EPA to have the agreement terminated now. It may be unfair to some cities which have no comparable agreement to require them to pay penalties when they fail to meet effluent limitations. It may be that EPA made a bad deal when it signed this consent decree. But none of these are reasons which justify termination of the settlement agreement. The only reason the government gives as a justification for seeking termination -- "the purpose of the decree has been satisfied" --is simply not the case. There may be other reasons to terminate the agreement, but this one is a legal fiction. It sets a bad precedent to

allow the contract to be set aside on this basis. I would not simply defer to the government in such matters of contract construction and enforcement. The government is, after all, a party to the contract.